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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

Nos. 709 and 710

PAUL V. McNUTT, Governor of the State of Indiana; PHILIP LUTZ, Attorney General of Indiana; RICHARD A. McKINLEY, Director of The Department of Financial Institutions of the State of Indiana; OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSER, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana; HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,

Appellants,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,

Appellee.

PAUL V. McNUTT, Governor of the State of Indiana; PHILIP LUTZ, Attorney General of Indiana; RICHARD A. McKINLEY, Director of The Department of Financial Institutions of the State of Indiana; OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSER, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana; HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,

Appellants,

v.

McHENRY CHEVROLET CO., INC.,

Appellee.

BRIEF FOR APPELLEES IN NOS. 709 AND 710

JOHN THOMAS SMITH,
PHILLIP W. HABERMAN,
DUANE R. DILLS,
ANTHONY J. RUSSO,
STANLEY B. ECKER,
PAUL Y. DAVIS.

INDEX

SUBJECT INDEX

PAGE

TABLE OF CASES iii

TABLE OF STATUTES CITED v

OTHER CITATIONS v

Statement of the Case 1

The Act 2

The Issue 7

The Facts 8

SUMMARY OF APPELLEES' ARGUMENT 15

ARGUMENT:

POINT I—The Act is unconstitutional and void in that it deprives the McHenry Chevrolet Company, Inc. of its property without due process of law by authorizing the fixing of prices of all automobiles sold by the McHenry Chevrolet Company Inc. in retail instalment sales 17

A. The Act fixes the instalment sale prices of all commodities having a cash price not in excess of $1,500 17

B. Legislative price fixing of all commodities is beyond the power of any State 19

POINT II—The Act cannot reasonably be deemed to promote the public welfare; the circumstances do not vindicate the Act as a reasonable exertion of governmental authority, and the Act has no reasonable relation to and is not adapted to a proper legislative purpose 21

PAGE

A. The "factual basis" for regulation urged by Appellants is not supported by the Findings of Fact 21

B. The alleged existence of "abuses" in the business of retail instalment selling or in the business of purchasing retail instalment contracts does not furnish justification for the fixing of all prices in retail instalment sales 33

POINT III—Sections 9, 10 and 15(d) and Sections 6 and 26(c) of the Act are unconstitutional and void in that they deprive McHenry Chevrolet Company, Inc. of its property without due process of law; and Sections 9, 10 and 15(d) and Section 13 are unconstitutional and void in that they deprive G.M.A.C. of its property without due process of law 45

POINT IV—If the provisions of the Act authorizing the fixing of maximum finance charges are invalid, all related provisions including those which regulate the sale and purchase of retail instalment contracts, being appendant to such provisions, must fall with them and therefore be declared invalid... 52

CONCLUSION 57

APPENDIX 58

TABLE OF CASES

PAGE

Allgeyer v. *Louisiana*, 165 U. S. 578 46

Bernier v. *Bernier*, 147 U. S. 242 6
In re Bibby, 9 F. (2d) 944 18
Billingsley v. *State Bank*, 3 Ind. 375 47
Bird v. *United States*, 187 U. S. 118 6
Borden's Farm Products Co. v. *Ten Eyk*, Vol. 80 L. Ed. 469 40

Carpenter v. *Shaw*, 280 U. S. 363 26
Commercial Credit Company v. *Shelton*, 139 Miss. 132, 104 So. 75 19
Commercial Credit Co. v. *Tarwater*, 215 Ala. 123, 110 So. 39 18
Conway v. *Skidmore* (Wyo., 1935), 41 P. (2d) 1049 .. 19

Daniel Bros. v. *Commissioner*, 28 F. (2d) 761 18
Davidson v. Davis, 59 Fla. 476, 52 So. 139 18

Fairmont Creamery Co. v. *Minn.*, 274 U. S. 1 .....16, 41

G.M.A.C. v. *Huron Finance Corporation* (S. D., 1935), 262 N. W 195 24
General Motors Acceptance Corporation v. *Mid-West Chevrolet Co.*, 66 F. (2d) 1 .....18, 47
Gilbert v. *Hudgens*, 92 Colo. 571 18
Grand Island Finance Co. v. *Fowler*, 124 Neb. 514, 247 N. W. 429 19

Hartwick Lumber Co. v. *Perlman*, 245 Mich. 3, 222 N. W. 147 18
Hays v. *Commissioner*, 261 Mass. 134 18
Hogg v. *Ruffner*, 66 U. S. 115 .....15, 18, 27, 33

Jones v. *G.M.A.C.*, 205 Ky. 227, 265 S. W. 620 24

Keefe v. *Bush & Lane Piano Co.*, 247 Mich. 82, 225 N. W. 585 18

PAGE

Manufacturer's Finance Trust v. *Stone*, 251 Ill. App. 414 18
Meserole Securities Co. v. *Cosman*, 253 N. Y. 130, 170 N. E. 519 47
Moeller, McPherrin & Judd v. *Smith*, 127 Neb. 424, 255 N. W. 551 25

Nebbia v. *New York*, 291 U. S. 502 ....16, 20, 40, 41, 43
Newkirk v. *Burson*, 28 Ind. 435 18
New State Ice Co. v. *Liebmann*, 285 U. S. 262 ..16, 28, 50
New York, P. & N. Telegraph Company v. *Dolan*, 265 U. S. 96 26
Nichols v. *Fearson*, 7 Peters 103 .....17, 29, 47

Pacific Finance Corporation v. *Lauman*, 95 Cal. App. 541, 273 P. 48 18
Panama Refining Co. v. *Ryan*, 293 U. S. 388 .....17, 49
Parker v. *Coburn*, 92 Mass. 82 18
Pierce v. *C. I. T. Corporation*, 170 Okla. 633, 41 P. (2d) 481 19
Porter v. *Stolkin* (Ind. App., 1936), 200 N. E. 74 18

Quaker City Cab Company v. *Pennsylvania*, 277 U. S. 389 26

Ribnik v. *McBride*, 277 U. S. 350 .....15, 16, 19, 39, 40

St. Louis Cotton Compress Co. v. *Arkansas*, 260 U. S. 346 26
Saylor v. *Brady*, 63 N. D. 471, 248 N. W. 673 19
Schechter v. *United States*, 295 U. S. 495 .....17, 49
Stevens v. *Grossman* (Ind App., 1935), 196 N. E. 123. 18

Tyson v. *Banton*, 273 U. S. 418 .....15, 16, 19, 41

United States v. *Tappan, et al*, 11 Wheat. 419 6
Unity v. *Burrage*, 103 U. S. 447 6

Williams v. *Standard Oil Co.*, 278 U. S. 235 15, 16, 17, 19, 28, 54
Charles Wolff Packing Co. v. *Court of Industrial Relations*, 262 U. S. 522 .....15, 16, 19, 36

PAGE

Zazzaro v. *Colonial Acceptance Corporation*, 117 Conn. 251, 167 Atl. 734 18
Zoercher v. *Alger*, 202 Ind. 214, 172 N. E. 186..... 49

TABLE OF STATUTES CITED

Baldwin's Indiana Statutes, 1934, §§ 9993, 9994, 9995, 9996 29
Chapter 474, Section 218.01, Laws of Wisconsin, 1935 39

OTHER CITATIONS

Usury in Installment Sales, Vol. II, Law and Contemporary Problems, pp. 148-172..... 28
Commentary on "Usury in Installment Sales", Vol. II, Law and Contemporary Problems, pp. 173-188.. 28
Report of the Wisconsin State Banking Commission.30, 39
Report of the Special Commission (Massachusetts) Established to Investigate the Advisability of Providing for the Licensing and Regulation of the Business of Financing Purchases of Certain Personal Property (January) 1936..... 39
Massachusetts Senate Bill 4 39
Massachusetts Senate Bill 55 39
Massachusetts House Bill 805 39
Constitution of Indiana, Article 3, Section 1 49
Report of the Department of Financial Institutions.24, 52

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HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,
Appellants,

v.

GENERAL MOTORS ACCEPTANCE CORPORATION OF INDIANA, INCORPORATED,
Appellee.

No. 709

PAUL V. MCNUTT, Governor of the State of Indiana;
PHILIP LUTZ, Attorney General of Indiana;
RICHARD A. MCKINLEY, Director of The Department of Financial Institutions of the State of Indiana;
OSCAR P. WELBORN, HARVEY B. HARTSOCK, C. M. SETSER, MYRON GRAY and ROBERT BATTON, Members of the Commission of Financial Institutions of the State of Indiana;
HERBERT M. SPENCER, Prosecuting Attorney of the Nineteenth Judicial Circuit of the State of Indiana,
Appellants,

v.

MCHENRY CHEVROLET CO., INC.,
Appellee.

No. 710

APPELLEES' BRIEF

Statement of the Case

INTRODUCTION. In the court below, the hearings in the two cases (Nos. 709 and 710) were consolidated, and but

one brief was filed by complainants as well as by defendants. Although Appellants have filed separate briefs on this appeal, the briefs are identical, except for certain references to the findings of fact. In the interest of clarity and because of the structure and subject-matter of the Act, only one brief is being filed by Appellees on this appeal. For convenience, Case No. 710 will be referred to as the *McHenry* case and Case No. 709 as the *G.M.A.C.* case, and the separate records in each case will be similarly identified. Similarly, Appellee, McHenry Chevrolet Co., Inc., will for convenience be designated as "Retail Seller," and Appellee, General Motors Acceptance Corporation of Indiana, Incorporated, as "G.M.A.C."

The proceedings in the court below have been adequately described in Appellants' briefs. The court's Conclusions of Law, identically phrased in each case, are also set forth (pp. 2 and 3 of McHenry and G.M.A.C. briefs of Appellants).

Inasmuch as the Act has been set out in its entirety in both of the briefs filed by Appellants, as well as in the transcripts of record it is unnecessary to include it in this brief.

The Act

SCOPE: The provisions of the Act may be divided into two groups: The first deals with the business of retail sellers, *i.e.*, the retail sale of goods in instalments and the creation of the instalment contract; and the second with the sale of the contracts by retail sellers and their purchase by companies such as G.M.A.C.

The principal provisions of the Act, briefly, are the following:

(1) Every written instrument evidencing a retail instalment sale is required to set forth specifically the cash price of the goods, the amount of the "down payment", the unpaid balance of the cash price, the cost to the retail buyer of the insurance, the principal balance (*i.e.*, the sum total of the unpaid balance of the cash price plus the cost of insurance), the amount of the finance charge, the time balance (the sum total of the principal balance and the finance charge) owed by the retail buyer, and the number of instalment payments and the amount and date of each payment.

(2) The finance charge to be added to the cash price may not exceed the maximum amount fixed by the Department of Financial Institutions which is authorized to fix this maximum.

(3) The Act gives the retail buyer the right to pay the unpaid balance of the purchase price at any time whether due or not, and authorizes the Department to fix the amount of the "discount" to be given for such prepayment, and also the maximum charges which the retail buyer may be required to pay for failure to meet any instalment of the time balance when it is due.

(4) The Act forbids retail sellers to sell their contracts to anyone except licensees.

(5) The Act requires all purchasers of instalment contracts to obtain a license which may be issued by the Department of Financial Institutions only if the Department finds that the applicant can operate its business "economically and efficiently"; the Department is also authorized to revoke or suspend licenses.

(6) The Act limits the amount which the retail seller may receive for his contracts and also imposes limitations,

—which fail to differentiate between without recourse sales and sales made with recourse to the retail seller or pursuant to repurchase agreements,—upon the amount which licensees may pay retail sellers therefor.

(7) The Act prohibits the making of contracts to prevent competition in the purchase of retail instalment contracts.

(8) The Act requires licensees to submit to examinations and to make reports to the Department of Financial Institutions; authorizes the Department to make rules and regulations governing the business done in the State of Indiana by licensees, and provides certain penalties for violations of the Act.

DEFINITIONS: The Act, in Section 1, defines a retail instalment sale as a sale in which the "cash price" is not in excess of $1,500, may be paid in instalments over a period of time and in which a security interest in the goods is retained by the seller. The term "cash price" is defined as the price, measured in dollars, "agreed upon in good faith by the parties for the specific goods which are the subject matter of any retail instalment sale". In the same Section, the Act defines the term "finance charge" as meaning "any consideration which the retail buyer contracts to pay the retail seller for the privilege of paying the principal balance in instalments over a period of time"; and the term "principal balance" is defined (in Section 4) as the unpaid balance of the "cash price" plus the cost to the retail buyer of the insurance.

The findings of fact show that the "cash price" is the price at which retail sellers sell their goods for cash (McHenry Findings 3-6 inclusive). That the term "cash

price" as used in the Act was intended by the General Assembly to have the same meaning is evident from the Report of the Department of Financial Institutions on which the General Assembly acted, and from the structure and content of the statute itself. The pleadings and the evidence introduced both by Appellees and by Appellants in the lower court clearly showed this to be the construction which both parties gave to the Act, and it was apparently on this construction that Appellants threatened to enforce the Act as applicable to the business of the retail seller (McHenry Record pp. 6 and 36, and see General Orders issued by the Indiana "Department of Financial Institutions" under the "Retail Instalment Sales Act" prior to the permanent injunction herein—McHenry R. 38-46; G.M.A.C. R. 36-44).

The "cash price" is of course a different "price" than the "time price"—the latter being the price which is arrived at *after* the retail seller has added to the cash price the amount which is known as the "finance charge" (McHenry Findings 3-6 inc.). Appellants, however, have advanced the astonishing theory that on a proper construction of the Act *the term "cash price" means the "time price";* that whatever price "is finally agreed upon by the parties must be set out in the conditional sale contract and is the "cash price" as that term is defined in the Act (Appellants' Briefs pp. 27-28). In their brief in the court below (at p. 65) Appellants, in advancing the same theory, set forth their views as to the manner in which the Act, so construed, would apply*:

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*In their briefs on this appeal (p. 11) Appellants state their views on this point as follows:

> "The Act expressly provides that the price of the merchandise referred to in the Act as the "Cash price" means the price agreed upon by the parties *without limitation as to the factors which may be taken into consideration in making the agreement.*" (Italics ours.)

> "The Retail Seller may sell his goods for any price which may be agreed upon between him and the Retail Buyer, and in doing so he may take into consideration the fact that the payment therefor is to be made on time and in instalments and he may fix a higher price on that account. That price, however arrived at, is the price denominated in this Act as the *cash price* which he is required to state in his contract and upon which the 'time balance' is constructed."

We submit that if this interpretation of the statute is correct, the Act becomes an *absurdity*. If this construction is adopted, the retail seller may add to the price at which he would have sold for cash as high a "finance charge" as he may desire to fix—and such a seller would not be subject to the provisions of the Act at all; he would be as free as before the enactment of the statute to include in his time price whatever amount of finance charge he chooses to add to the cash price of his goods. If such is the construction to be given to the Act, its primary purpose, to wit, the regulation of what Appellants are pleased to term "the cost of credit" becomes impossible of achievement; the Act wholly fails of its purpose and, if Appellants are correct in their contention, the Act stands condemned by its own guardians.

Although it is true as Appellants contend (Appellants' Briefs p. 11) that the court, in the construction of a statute, will, if possible, give it a construction in harmony with constitutionality, it is also true that no statute should receive a construction that will render it nugatory, "* * * or which prescribes a rule utterly impractical * * * " (*United States* v. *Tappan, et al.*, 11 Wheat. 419 (at p. 426)).

> *Unity* v. *Burrage*, 103 U. S. 447 at p. 457;
> *Bird* v. *United States*, 187 U. S. 118 at p. 124;
> *Bernier* v. *Bernier*, 147 U. S. 242 at p. 245.

The Issue

The premise of Appellants' argument is that the Act regulates but *one* business, the business "of extending credit" to retail buyers in instalment sales of merchandise, by empowering the fixing of the cost of "extension of credit" in retail instalment sales (Appellants' Briefs, pp. 38 and 16). Arguing from that characterization, Appellants reach the conclusion that the State has the power to regulate instalment sale transactions by fixing the maximum amount of what the Act designates as the "finance charge".

Fearing, however, the "constitutional pitfalls involved in the case of any attempt to fix the price of merchandise generally", Appellants deny the existence of any provision in the Act authorizing the fixing of the prices of merchandise sold in instalment sales, and likewise deny that it was the purpose of the Act to do so. (Appellants' Briefs, pp. 10-11). As has been pointed out above, however, this denial is premised on a construction of the statute which renders it meaningless, as well as totally inconsistent with the admission in Appellants' pleadings that the Act is ". . . applicable to the business of Retail Seller . . .", and with the threatened enforcement of the Act as applied to the businesses conducted by the Retail Sellers (*supra* pp. 5 and 6).

It is Appellees' contention that the fixing of prices is exactly what the Act accomplishes—since it is the sale of goods, and not the "extension of credit" or "loans", that is involved. Stated otherwise, since the time-price differential, or what is termed in the Act the "finance charge", is an integral element in a merchant's instalment sale price the maximum amount of this differential cannot be fixed without fixing the retail instalment sale price of the goods.

It follows that if the Act is to be justified as a valid exercise of governmental authority, the authority it grants to fix maximum "finance charges" in retail instalment sales must be predicated on some basis other than that the transactions are sales of goods. Conversely, if they *are* sales,—at prices payable in instalments rather than in cash,—and if they are not extensions of credit or loans, the Act's interference with the business and transactions of the Appellees cannot be justified. The ultimate issue, then is the determination of the real nature of the transactions affected by the Act. Such a determination cannot be accomplished by characterization or by mere assertions that instalment sales of merchandise constitute an "extension of credit business"; it *can* and *should* be accomplished, however, by an examination of the *facts*.

The basic and primary facts with which the Act deals are the following: —

The Facts

A. *Basic Facts Relating to the Business of McHenry Chevrolet Company, Inc.*

McHenry Chevrolet Company, Inc. is an automobile dealer, selling at retail new and used automobiles for cash or on the instalment plan. From sixty to sixty-five per cent of its sales are instalment or time sales, in which the price fixed in the written contract, which is usually higher than the cash sale price for the same automobile, is known as the time price (McHenry Findings 2 and 3).

The buyer may be quoted the "cash sale price" (or "cash price"), or the time price or both; in many instances of new

car sales the buyer is already acquainted with the cash sale price (McHenry Finding 4). The time price may be determined arbitrarily by the Retail Seller or with reference to charts and other data supplied by G.M.A.C. or other finance companies (McHenry Findings 5 and 18). The retail seller may add whatever amount he desires in arriving at or fixing the time price to the retail buyer (G.M.A.C. Finding 9).

In arriving at its time price the Retail Seller increases the cash price for which it would have sold the automobile if it were a cash sale by an amount which is sometimes designated as the "differential" and which is popularly known as "the finance charge" (McHenry Finding 6; G.M.A.C. Finding 22). There is no agreement between Retail Seller and the retail buyer for a cash sale at a cash price, nor is there any agreement for the buyer's payment of a cash price, as if the sale were for cash, plus an additional amount equal to the difference between the agreed price and the price at which the Retail Seller would have agreed to sell the car if the sale were for cash. The one and only contract between Retail Seller and the retail buyer is the instalment contract of sale and purchase of the automobile at the price agreed to be paid by the retail buyer. (McHenry Finding 6). The buyer is required to make a down payment in cash or its equivalent, generally to the extent of one-third of the cash price (McHenry Finding 8). Instalment sales by the Retail Seller are evidenced by contracts of conditional sale at the agreed time price, which is payable in instalments; the contracts reserve title to the automobile until full payment of the agreed price by the retail buyer (McHenry Finding 5).

Where insurance is not carried by the retail buyer the cost of fire, theft and accidental physical damage, and

usually collision, insurance is a factor which influences the Retail Seller in fixing the time price (McHenry Finding 7; G.M.A.C. Finding 11).

In addition, the time price in instalment sales of merchandise, such as automobiles in this retail seller's case, involves and reflects allowance for other cost and risk factors determined, from experience, as necessary elements in instalment sale prices of merchandise, whether the instalment sale contracts resulting from such transactions are retained and handled by the retail seller or sold to and handled by an assignee; such factors require allowance for cost, expense and loss hazard incident to the handling and collection of the instalment contract obligation and include the investment of capital involved in the sale on credit, expense of investigating the retail buyer's ability to pay, the cost and expense of preparing contracts and other forms, setting up and keeping books and accounts and the manifold tasks in the collection and posting of instalments of the unpaid balance under such instalment sale obligations, the cost of effecting repossessions upon default on the part of the buyer as obligor thereunder, the expense of court proceedings and attorneys' fees, and provision for reserves against the risk of loss due to the buyer's failure to pay and either the seller's inability to repossess the goods at all or excessive depreciation in value thereof, below the amount unpaid, to the prejudice of the resale value of the goods in the event of repossession. (McHenry Finding 10).

The manner in which McHenry Chevrolet Co. Inc. makes instalment sales is typical of instalment sales by most automobile dealers and most dealers in other products, although it is the practice of some merchants in certain

goods and commodities to quote or mark their goods with only a time price from which they may make a reduction for a cash purchase (McHenry Finding 9).

B. *Basic Facts Relating to the Business of General Motors Acceptance Corporation of Indiana, Inc.*

General Motors Acceptance Corporation of Indiana, Inc. is engaged in the business of purchasing retail instalment contracts covering products manufactured by General Motors Corporation or its divisions. Most of the retail sellers with whom G.M.A.C. does business are automobile dealers but it also does business with dealers in electric refrigerators or electric heating equipment or appliances such as vacuum cleaners which are manufactured by General Motors Corporation (McHenry Finding 11; G.M.A.C. Findings 1, 2 and 3). G.M.A.C. and companies engaged in the same kind of business are generally called "finance companies" (McHenry Finding 12). G.M.A.C. buys instalment sale contracts from dealers after the time sale transactions have been consummated; it has no dealings with the retail buyer until after it has purchased the contract from the dealer; as assignee, it then collects from the retail buyer the unpaid balance of the time price according to the retail contract which it has purchased (G.M.A.C. Finding 4; G.M.A.C. Finding 9). G.M.A.C. is not obligated to purchase contracts from the Retail Seller or any other dealer. Neither the Retail Seller nor any other dealer is obligated to sell its contracts to G.M.A.C. or any other finance company (McHenry Finding 12; G.M.A.C. Finding 5). Not all General Motors dealers in Indiana sell their instalment sale contracts to

G.M.A.C., and those dealers which do business with it do not sell all of their contracts to it (G.M.A.C. Finding 5). If G.M.A.C. purchases a contract from the Retail Seller or any other dealer, the purchase is governed by the terms and conditions of the so-called G.M.A.C. retail plan, the details of this plan are set forth in full in McHenry Finding 12 and G.M.A.C. Finding 6.

As a convenience to dealers G.M.A.C. furnishes them with certain material in anticipation of the dealers' offering their contracts to G.M.A.C. for purchase, including forms of retail contracts and rate or payment charts by means of which the dealers are enabled to determine quickly the differential to be added to the cash price in determining the time price of the car which is being sold on the instalment plan; the dealer is not required to use the G.M.A.C. charts or other forms but does so if he expects to offer the instalment contract to G.M.A.C. (McHenry Findings 13 and 14; G.M.A.C. 8). When G.M.A.C. accepts a contract for purchase it is assigned and delivered to G.M.A.C. by the dealer who thereupon receives an amount which, together with the down payment received from the retail buyer, is equivalent to the price which the dealer would have received for a cash sale of the automobile (McHenry Finding 15; G.M.A.C. Finding 8).

The Retail Seller and the retail buyer are the only parties to the instalment contract and sale (G.M.A.C. Finding 9, McHenry Finding 18). G.M.A.C. is not a party to it, and it has and acquires no interest therein unless and until the contract is offered to and purchased by it from the dealer (G.M.A.C. Findings 4 and 9; McHenry Finding 18). The differential used by the Retail Seller in fixing the time price to any retail buyer may be determined by the

dealer solely and independently of G.M.A.C. or any other company in the business of purchasing instalment sale contracts; the Retail Seller may add whatever amount he desires in arriving at or fixing his or its time price to the retail buyer, the Retail Seller may not even intend to dispose of the contract, but even if it should desire to do so, it is not able to determine, when fixing the time price, whether the installment sale contract will be purchased by G.M.A.C. or some other company, because the latter have no obligation whatever to purchase contracts offered by dealers; and the Retail Seller cannot determine whether it may be required to hypothecate the contract with a bank or other financial agency or be forced to carry it (McHenry Finding 18).

After G.M.A.C. has purchased the contract from the dealer, if insurance coverage is to be provided G.M.A.C. purchases and pays for the policy of insurance protecting the buyer and G.M.A.C. against loss by fire, theft, accidental physical damage, and, in most cases collision. In such cases a certificate of insurance for which G.M.A.C. pays is sent to the retail buyer by G.M.A.C. (G.M.A.C. Finding 11). In addition to the cost and expense of handling and collecting the contracts and repossession of the property whenever necessary, G.M.A.C. assumes under the terms of its retail plan all risk of loss resulting from its inability to collect from the retail buyer any part of the unpaid price obligation under the contract purchased from the dealer and resulting from its inability to repossess the property either because the latter has been put out of its reach or for some other reason; the dealer's contingent liability on the assignment of the contract to G.M.A.C. is limited by the terms of the G.M.A.C. retail plan so that the dealer incurs no liability as a consequence of the retail buyer's failure to pay

the balance of the price, except when G.M.A.C. effects repossession of the property and delivers it to the dealer (G.M.A.C. Finding 12). In such a case the dealer may or may not sustain a loss, depending on the resale value of the property as compared with the amount the dealer may have to pay G.M.A.C. (G.M.A.C. Finding 13). In recognition of this loss on the part of the dealer G.M.A.C. sets up and credits a reserve account in the dealer's favor with a stipulated portion of G.M.A.C.'s differential in the price paid by it on the purchase of the contract; and periodic payments are made to the dealer out of this accumulated reserve (G.M.A.C. Finding 14).

If G.M.A.C. accepts and purchases retail contracts from dealers, it takes over from the latter and assumes numerous duties and tasks involved in the ownership acquired in the contracts by setting up an account for each of them and handling the collection of the instalments payable under the contracts, court proceedings and repossession of the property; for those purposes, G.M.A.C. maintains an extensive organization, equipment and personnel engaged in carrying on the various functions of its business in buying acceptable contracts, collecting same and protecting its investment therein, at considerable items of cost and expense for salaries, borrowing of money for the supplying of capital to maintain a volume of new business, organization expenses and the like (G.M.A.C. Finding 10).

Most of the finance companies doing business in Indiana, as well as G.M.A.C., furnish similar forms of contracts, data and material to retail sellers generally, in the same manner that they are furnished to General Motors Corporation's dealers by G M.A.C.; the facilities of many, not less than one hundred forty, such companies, located

in Indiana and engaged in the business of purchasing retail instalment sale contracts from retail sellers, are available to dealers; the method of doing business of these companies is essentially identical with that of G.M.A.C., except as pointed out in G.M.A.C. Finding 17 (McHenry Finding 22; G.M.A.C. Findings 15 and 16).

* * * * * * * * *

The foregoing outlines the basic facts, as found by the Court below, relating to the businesses with which the Act deals. Other findings of fact material to the determination of this appeal will be referred to in the argument.

Summary of Appellees' Argument

Point I.

The Act is unconstitutional and void in that it deprives the McHenry Chevrolet Company, Inc. of its property without due process of law by authorizing the fixing of prices of all automobiles sold by the McHenry Chevrolet Company, Inc. in retail instalment sales.

A. *The Act fixes the instalment sale prices of all commodities having a cash price not in excess of $1,500.*

Hogg v. *Ruffner,* 66 U. S. 115.

B. *Legislative price-fixing of all commodities is beyond the power of any state.*

Chas. Wolff Packing Co. v. *Court of Industrial Relations,* 262 U. S. 522;
Williams v. *Standard Oil Co.,* 278 U. S. 235;
Ribnik v. *McBride,* 277 U. S. 350;
Tyson v. *Banton,* 273 U. S. 418.

Point II.

The Act cannot reasonably be deemed to promote the public welfare; the circumstances do not vindicate the Act as a reasonable exertion of governmental authority; and the Act has no reasonable relation to and is not adapted to a proper legislative purpose.

Williams v. *Standard Oil Co., supra;*
New State Ice Co. v. *Liebmann,* 285 U. S. 262;
Nebbia v. *New York,* 291 U. S. 502.

A. *The "factual basis" for regulation urged by Appellants is not supported by the Findings of Fact.*

B. *The alleged existence of "abuses" in the business of retail instalment selling or in the business of purchasing retail instalment contracts does not furnish justification for the fixing of all prices in retail instalment sales.*

Chas. Wolff Packing Co. v. *Court of Industrial Relations, supra;*
Tyson v. *Banton, supra;*
Fairmont Creamery Co. v. *Minn.,* 273 U. S. 1;
Ribnik v. *McBride, supra.*

Point III.

Sections 9, 10 and 15(d) and Section 6 and 26(c) of the Act are unconstitutional and void in that they deprive McHenry Chevrolet Company, Inc. of its property without due process of law; and Sections 9, 10 and 15(d) and Section 13 are unconstitutional and void in that they deprive G.M.A.C. of its property without due process of law.

Panama Refining Co. v. *Ryan,* 293 U. S. 388;
Schechter v. *United States,* 295 U. S. 495;
Nichols v. *Fearson,* 7 Peters 103.

POINT IV.

If the provisions of the Act authorizing the fixing of maximum finance charges are invalid, all related provisions including those which regulate the sale and purchase of retail instalment contracts, being appendant to such provisions, must fall with them and therefore be declared invalid.

Williams v. *Standard Oil Co., supra.*

ARGUMENT

POINT I

The Act is unconstitutional and void in that it deprives the McHenry Chevrolet Company, Inc. of its property without due process of law by authorizing the fixing of prices of all automobiles sold by the McHenry Chevrolet Company Inc. in retail instalment sales.

A. *The Act fixes the instalment sale prices of all commodities having a cash price not in excess of $1,500.*

The trial court found that all instalment sales made by the McHenry Chevrolet Company Inc. are made at an agreed time price, and that the finance charge is an integral part of that price (McHenry Findings 3, 5, 6 and 18). Under the Act (Sections 6 and 26) the finance charge may not exceed the maximum amount authorized by the Department

of Financial Institutions. To fix this maximum is therefore to fix the maximum price at which retail sellers may make instalment sales of automobiles or any other goods having a cash price not in excess of $1,500.

This conclusion is based on the plain provisions of the Act as applied to the facts found by the trial court, and on a construction of the Act's provisions (*supra* pp. 5, 6) which gives effect to the purpose ascribed to it by Appellants; any other construction would nullify that purpose (*supra* p. 6).* So construed, the Act unquestionably fixes retail instalment prices since it is established as a matter of law,—as is apparently conceded by Appellants (Appellants' Briefs pp. 28-29)—that the time-price differential, or what the Act defines as the "finance charge", is an integral part of the time price. As early as the year 1861, this Court held that the difference between the cash price and the time price in an instalment sale is not interest, and that a sale on instalments "has none of the characteristics of usury". *Hogg* v. *Ruffner*, 66 U. S. 115 at 119. Numerous as have been the decisions since that date—a few, including the leading *Indiana* cases, are cited in the footnote**—none has ques-

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*Appellants concede that on this construction of the Act " * * * the right of the seller to name his price * * * " would be put in issue (Appellants' Briefs p. 29, lines 7 and 8).

**_Newkirk_ v. _Burson_, 28 Ind. 435; _Stevens_ v. _Grossman_, (Ind. App., 1935) 196 N. E. 123; _Porter_ v. _Stolkin_, (Ind. App., 1936) 200 N. E. 74; _In re Bibbey_, 9 F. (2d) 944; _Daniel Bros._ v. _Commissioner_, 28 F. (2d) 761; _General Motors Acceptance Corporation_ v. _Mid-West Chevrolet Co._, 66 F. (2d) 1; _Commercial Credit Co._ v. _Tarwater_, 215 Ala. 123, 110 So. 39; _Pacific Finance Corporation_ v. _Lauman_, 95 Cal App. 541, 273 P. 48; _Zazzaro_ v. _Colonial Acceptance Corporation_, 117 Conn. 251; 167 Atl. 734; _Gilbert_ v. _Hudgens_, 92 Colo. 571; _Davidson_ v. _Davis_, 59 Fla. 476, 52 So. 139; _Manufacturer's Finance Trust_ v. _Stone_, 251 Ill. App. 414; _Parker_ v. _Coburn_, 92 Mass. 82; _Hayes_ v. _Commissioner_, 261 Mass. 134; _Hartwick Lumber Co._ v. _Perlman_, 245 Mich. 3, 222 N. W. 147; _Keefe_ v.

tioned the fundamental principle that retail sellers may have one price for a cash sale and a higher price for an instalment sale; that the difference between the cash price and the time price is not interest and that a sale on instalments has "none of the characteristics of usury".

The Indiana Act fixes definite limits upon the right of a retail seller to fix his own time price by empowering the Department of Financial Institutions to fix the maximum finance charge which he may add to the cash price in determining the time price—not only of automobiles *but of every other commodity the cash price of which does not exceed $1,500.*

B. *Legislative price fixing of all commodities is beyond the power of any State.*

We believe it to be established beyond question that legislative price fixing of ordinary commodities of sale is beyond the power of a State Legislature.

> *Chas. Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U. S. 522;
> *Williams* v. *Standard Oil Co.,* 278 U. S. 235;
> *Ribnik* v. *McBride,* 277 U. S. 350;
> *Tyson* v. *Banton,* 273 U. S. 418.

It follows therefore that it is beyond the power of a State Legislature to fix the prices of *all* commodities selling for

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Bush and Lane Piano Co., 247 Mich. 82, 225 N. W. 585; *Commercial Credit Co.* v. *Shelton,* 139 Miss. 132, 104 So. 75; *Grand Island Finance Co.* v. *Fowler,* 124 Neb. 514, 247 N. W. 429; *Saylor* v. *Brady,* 63 N. D. 471, 248 N. W. 673; *Pierce* v. *C. I. T. Corporation,* 170 Okla. 633, 41 P. (2d) 481; *Conway* v. *Skidmore* (Wyo., 1935), 41 P. (2d) 1049.

cash at not in excess of $1,500. We do not believe that the underlying principles of these cases have been altered or overruled by the recent decision of this Court in *Nebbia* v. *New York*, 291 U. S. 502—upon which Appellants seem to place their principal reliance.

We believe the following to be the *ratio decidendi* of the *Nebbia* case: Although "* * * there is no closed class or category of business affected with the public interest * * *", it is nevertheless the function of the Courts in connection with the Fourteenth Amendment "to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory". A definite limitation exists upon the freedom of a State *to adopt an economic policy:* the economic policy must be one which "may reasonably be deemed to promote the public welfare". This limitation, moreover, is in addition to the requirement that the law, once the policy is adopted, must be "adapted to its purpose" and that it "* * * have a reasonable relation to a proper legislative purpose".

It is only if State legislation meets all of the foregoing requirements that any presumption exists in favor of its validity. It is submitted that none of them is met by the legislation under consideration.

POINT II.

The Act cannot reasonably be deemed to promote the public welfare; the circumstances do not vindicate the Act as a reasonable exertion of governmental authority, and the Act has no reasonable relation to and is not adapted to a proper legislative purpose.

A. *The "factual basis" for regulation urged by Appellants is not supported by the Findings of Fact.*

The premise of Appellants' entire argument that the circumstances constituting the "factual basis" for regulation vindicate the Act as a reasonable exertion of governmental authority in the promotion of the public welfare is this: There is only one "business" whose regulation is provided for by the Act; this business which Appellants term "the business of financing retail instalment sales" is used "by a considerable portion of the people of the State * * *" Appellants' Briefs pp. 3, 9); the usury statutes are "inadequate" to effectually regulate such business, and the Act was adopted in order to "protect" the retail instalment buyer by "* * * providing for the fixing of maximum finance charges, which bears a similar relation to the established method of financing retail instalment sales as interest bears to the forbearance of money * * *" (See Appellants' Briefs p. 43); the "net result or effect of the transaction is the loan of money". While admitting that there is nothing "* * * in the transaction that in a strict sense can be called the loan of money * * *", they argue (Appellants' Briefs p. 38) that the net result or effect of

the "combined relationship between the retail seller, the retail buyer and the finance company constitute a method of doing business * * *" which Appellants contend, at least inferentially, is merely a "method of defeating usury laws * * *" (Appellants' Briefs p. 32).

The findings of fact do not support Appellants' premise that there is only *one* business whose regulation is provided for by the Act. On the contrary, these findings establish that the businesses of the Appellants are entirely separate businesses, and that the business of McHenry Chevrolet Co. Inc. is completely independent of that of G.M.A.C. The Trial Court found: that the business of McHenry Chevrolet Co. Inc. is that of a retail seller of automobiles (McHenry Finding 1); that the business of G.M.A.C. is that of purchasing retail instalment contracts arising out of the retail instalment sale of automobiles and other General Motors products (G.M.A.C. Finding 2); that McHenry Chevrolet Co. Inc. is entirely free to add to its cash price whatever finance charge it pleases in arriving at the time price and that the time prices which it fixes may be arbitrarily determined by McHenry Chevrolet Co. Inc. or with reference to charts furnished by G.M.A.C. or by any other finance company (McHenry Findings 5, 10 and 18; G.M.A.C. Findings 4, 5 and 9); that G.M.A.C. has no dealings whatsoever with the retail buyer until after the instalment sale has been completed and it has purchased the contract from the Retail Seller (McHenry Finding 18; G.M.A.C. Findings 4 and 9); that McHenry Chevrolet Co. Inc. is entirely free to retain ownership of its retail instalment contracts or to dispose of them to G.M.A.C. or any other finance company, bank or other third party if it so chooses (McHenry Findings 12 and 18; G.M.A.C. Finding

5); and that G.M.A.C. is entirely free to purchase or not, as it pleases, such contracts as may be offered to it by McHenry Chevrolet Co. Inc. or any other retail seller (G.M.A.C. Finding 5).

The Findings of Fact (*supra*, pp. 8 to 15) show that G.M.A.C. has nothing to do with the transaction between the retail seller and the retail buyer. The differential used by the retail seller in fixing the time price to the retail buyer is determined by the dealer independently of G.M.A.C. or any other finance company. When the retail seller makes the instalment sale he may intend to keep the retail instalment contract or offer to sell it to G.M.A.C. or to some other third party. Moreover, when he makes the sale and fixes the time price of his goods he does not know whether, if he offers it for sale, G.M.A.C. or some other company will purchase it or whether he may be forced to keep it. That being so, it is pure fiction to conceive of the dealer as being anything but independent in the conduct of the instalment sale and in his determination of the amount of the time price. It is *his* transaction with his customer, and it is none the less his because he may intend to sell the contract to G.M.A.C. or some other company, or because subsequently he actually does sell the contract. If the retail seller has a chart supplied by G.M.A.C. he may use it or not as he pleases, and if he does use it he may or may not offer the contract to G.M.A.C. When he uses the chart to assist him in determining a time price differential corresponding to the indicated G. M. A. C. discount, he does so because of his willingness to accept G.M.A.C.'s discount as the criterion, from an experienced source, of the amount necessary to cover the cost and risk factors in the event that he should elect not to offer it to G. M. A. C.

or in the event that he is unable ultimately to sell the contract to G.M.A.C. This of course does not justify the conclusion that he is not free and independent in his transaction with the retail buyer.*

It follows therefore that the factual premise upon which Appellants have attempted to build their argument that only one business,—that of "financing retail instalment sales" —is subjected to regulation by the Act, must fail, and with it the allegation that a "relationship" exists between retail sellers, retail buyers and finance companies which is merely a "method of defeating usury" laws. The Report of the Department of Financial Institutions, on which the Legislature acted in drafting the statute, clearly differentiates as between the business of dealers and the business of finance companies, and makes it clear that the Department was recommending restriction of the origi-

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*The independence of the business of the automobile dealer from that of G. M. A. C. has been judicially recognized in several decisions. These decisions involve the question of whether the purchase by G. M. A. C.'s parent New York corporation, in one state, of contracts from dealers in another state, constitute doing business in the latter state. For example, in *Jones* v. *GMAC*, 205 Ky. 227 at p. 229, 265 S. W. 620 at p. 621 (recently cited and quoted along with others in *GMAC* v. *Huron Finance Corporation* (S. D., 1935), 262 N. W. 195 at p. 197), the Kentucky Court said:

> "* * * It has no contract with the dealer, and is not obligated to discount any of his paper, nor is the dealer obligated to transact any of his business with the appellee. He forwards only such notes as he may desire to have discounted by the appellee, and the latter discounts only such of those notes as it may desire to handle. Each transaction is separate and distinct, is not made pursuant to any contract, and is not consummated until the appellee has satisfied itself as to the credit rating of the maker of the note and of the dealer, and has agreed to and does discount the note. *The dealer does not represent the appellee, nor has either any interest in or control of the business of the other.*" (Italics ours.)

nal contract between the buyer and the seller—*both in the case of dealers "* * * who hold their own paper. * * *" and in the case of dealers who dispose of their paper to finance companies.* (See last sentence of McHenry Finding 26; G.M.C.A. Finding 21). From the structure of the Act itself, moreover, it is apparent that the primary purpose of the Legislature was to limit the time-price of goods, and it was only to make such limitation effective that additional provisions were incorporated in the Act relating to the business of finance companies.

Appellants' thesis, that the Act is vindicated as a reasonable exertion of governmental authority because, to use Appellants' characterization, a loan or extension of credit is involved, begs the question: Appellees do not disagree with the propositon that it is a legitimate exercise of police power to regulate loans and a loan business, nor do they dispute the authorities which justify the protection of a necessitous borrowing public through the so-called usury statutes. The question under discussion is not solved, however, by the characterization of the difference, exclusive of insurance, between a cash price and a time price in sales of merchandise as "effective rates of interest for the extension of credit" (G.M.A.C. R. p. 62; McHenry R. p. 66). Nor is it determined by the fact that the Act termed the difference a "finance charge". *The Legislature cannot, by using a phrase to suit its own purpose, obliterate or ignore the essential nature of a transaction.* When another legislature attempted to do the same thing in respect of a classification of tangible and intangible property, the Nebraska Court said, in the case of *Moeller, McPherrin & Judd* v. *Smith*, 127 Neb. 424, at p. 433, 255 N. W. 551, at pp. 555 and 556:

> "Can the Legislature define and designate as tangible that which is, in fact and in truth, intangible? It may be admitted that the Legislature has power to define words used by it, but is this an unlimited power, or is it subject to a reasonable construction? Tangible is the direct opposite of intangible; and can the Legislature, under the guise of calling it two separate classes of tangible property, include all intangible property under class 2 of tangible property? In our opinion, there is a limit to the Legislature's power to nullify and circumvert constitutional provisions by putting an arbitrary, but improper and unfounded, definition upon a certain word."

Similarly, this Court has refused to be bound by any characterization of a state statute so far as it may have a bearing upon the question of the constitutional effect of the legislation, and even though the highest court of the state may have approved the characterization. *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346. To like effect are *Quaker City Cab Company* v. *Pennsylvania,* 277 U. S. 389; *New York P. & N. Telegraph Company* v. *Dolan,* 265 U. S. 96; and *Carpenter* v. *Shaw,* 280 U. S. 363.

The instalment sale transaction between the Retail Seller and the retail buyer is a genuine sale of merchandise at the Retail Seller's price. The Retail Seller may have one price for a cash sale and another for an instalment sale, and it is well settled (*supra* p. 18) that the difference between the two prices does not constitute, nor is it comparable to, interest. The difference between the two prices reflects the cost and risk-of-loss factors involved in time-sales as compared with cash sales, and the transaction with the

retail buyer is none the less a sale and the time-price none the less a sale-price because the Retail Seller permits the buyer time in which to pay part of the price in instalments.

Instalment sale transactions are just as much sales as those of the department store which sells goods to certain of its customers on open credit, or, as it is popularly known "charge account". The misleading inference created by Appellants' misuse of the word "credit" throughout their briefs is exposed by a closer scrutiny and an accurate application of the term, from which it will be seen that the retail buyer's "credit" is involved only to the extent and in the sense of his ability to pay *the whole price* in the case of the department store charge-account sale, and in the case of a merchant's instalment sale of goods, the *balance of the price.*

Appellants admit the inadequacy of existing usury laws "* * * to cope with the cost of credit in transactions of this character, * * *" (Appellants' Briefs, page 12). They urge that the usury laws are not "* * * the uppermost limits to which a state may go in advancing the general prosperity and welfare of its citizens through control of the cost of credit" (Appellants' Briefs, page 13). It is submitted that these statements are equivalent to an admission, and constitute merely another way of saying, that usury statutes cannot be made the foundation of the power to fix time prices *because* the instalment sale transaction is not an "extension of credit" or a "loan" and because, as this Court has said, the instalment sale transaction "* * * has none of the characteristics of usury." *Hogg* v. *Ruffner,* 66 U. S. 115, at page 119. To avoid the "constitutional pitfalls" which, as conceded by Appellants, would obstruct the path to control of merchants' prices in instalment sales of all commodities, the Act has been given a surface-

coat of constitutional validity by painting its subject matter in terms of "extending credit" and of "finance charges." Stripped of such characterization, the Act is sought to be upheld on the ground that the existing usury laws are "inadequate" in this situation, even though enactment of this statute would mean a distortion of the concept of such laws, and a claim of untrammeled power in the General Assembly of the State of Indiana to control the prices of all goods sold in instalment sales, a power unlimited by the restraining hand of due process, to which Appellants pay only passing lip service.

In their argument on this point Appellants say that a "considerable portion of the people of the State" make instalment purchases,* and particularly "small wage earners or necessitous persons" (Appellants' Briefs pp. 9, 32), and appear to urge that the same justification, from the standpoint of the promotion of the public welfare exists for this statute as justified the enactment of usury statutes.**

It is obvious that neither the same nor similar historic or factual reasons of public policy can be advanced to justify fixing the maximum by which the time prices on goods may exceed their cash prices. Both American and English usury statutes rely for their justification upon the protection which they are intended to afford the indigent,

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*This Court has repeatedly held that neither the size of a business nor the extent to which the commodities of a business are used may be urged in support of a price fixing statute.

Williams v. *Standard Oil Co.*, 278 U. S. 235;
New State Ice Co. v. *Liebmann*, 285 U. S. 262.

**Appellants have commended to the attention of this Court (Appellants' Briefs p. 30) an article by Raoul Berger entitled "Usury in Instalment Sales" in Volume II of Law and Contemporary Problems, pp. 148-172. Since Appellants have omitted to do so, we respectfully call to the Court's attention the "Commentary" on this article, contained in the same issue of Law and Contemporary Problems and written by one of the authors of this brief.

necessitous and oppressed borrower from the "rapacity" of the lender.* It has been frequently said that such a borrower is deemed to be in the same category with persons under legal disability; as expressed by this Court in the case of *Nichols* v. *Fearson,* 7 Peters 103, at page 111: "The acts against usury were intended to protect the needy; * * *".

The Indiana Retail Installment Sales Act is not for the protection of the "necessitous", because the instalment buyer cannot be said to be "necessitous". He is moved only by desire, and not by necessity. He is a free agent in a competitive market (McHenry Findings 39 and 42; G.M.A.C. Findings 34 and 37). He is as much a voluntary buyer of goods as is a cash buyer; he needs no more protection than does a cash buyer having substantially the same financial means; he can take his time or he can wholly refrain from purchasing until he has accumulated the funds necessary to buy for cash. As stated by the court below in Finding No. 39 in the *McHenry* case (Finding 34 in the *G.M.A.C.* case):

> "The purchase of an automobile or other desired merchandise on time is the gratification of the buyer's preference for the present use and enjoyment thereof which is made available to him by the method of instalment purchase, as against deferring present use and enjoyment until he has accumulated sufficient funds to make a cash purchase, and, except for the down payment, as against paying out of accumulated capital, as for example, balances in commercial or savings banks. In order that the retail buyer may purchase the merchandise on time,

*It is significant in this connection to note that the State of Indiana has recognized that corporate borrowers do not need the protection afforded by usury statutes and accordingly has enacted a statute which takes away from the corporate borrower the defense of usury. Baldwin's Indiana Statutes, 1934, §§ 9993, 9994, 9995, 9996.

> his ability to make the necessary down payment and to pay the instalments of the time price must be demonstrated and established to the satisfaction of complainant."

This finding establishes not only that the retail buyer is a voluntary buyer but it also establishes that he is a buyer who must have the means to make a substantial down payment and sufficient income to satisfy the retail seller as to his ability to pay the balance of the price. The distinction between the necessitous borrower and the instalment buyer is further emphasized by the fact that the latter acquires a new asset in the purchase he makes, whereas the needy borrower in most cases employs the proceeds of his borrowing to discharge a previously existing debt. As stated (at page 59) in the Report of the Wisconsin State Banking Commission (*infra*, p. 39.):

> "Furthermore, the Committee feels that there are reasons in requiring a maximum rate on cash loans which do not exist under merchandise instalment credit. In a great many instances, cash loans are predicated upon emergencies which are so urgent that the borrower will make almost any sacrifice to make a loan. This makes him an especially easy subject for exploitation."

The Act, furthermore, does not affect, except possibly to a slight extent, the needy or the poor: It was stipulated between Appellants and Appellees (McHenry Record p. 79 ff.; G.M.A.C. Record p. 76 ff.) that for the purpose of this appeal the special findings of fact might be treated as supported by the evidence, with the exception of Finding No. 40 in the *McHenry* case (which is the same as Finding No. 35 in the *G.M.A.C.* case.) This finding to which Appellees object as not being warranted by the evidence reads as follows:

> "There are 843,066 families in the State of Indiana. Out of this number there are 700,000 families whose yearly income is less than $2400 each. There are 400,000 families whose yearly income is less than $1,000 each. The latter class of families constitute the largest class of purchasers of merchandise who use credit provided by means of retail instalment sales and contracts."

The evidence relevant to this finding is set out in full in the stipulation (McHenry Record p. 79 ff.; G.M.A.C. Record p. 76 ff.).

It is submitted that Appellants' own evidence on which this finding was based fails to support it. The affidavit of Mr. Edwards, submitted by Appellants, refers to income groups of $1000 and $2400, and states that most of the families *in these groups* could not purchase commodities normally sold on the instalment plan out of accummulated savings. Giving Appellants' evidence its broadest interpretation, the last sentence of the finding should therefore have read: "Families in these two income classes constitute the largest class of purchasers of merchandise who use credit provided by means of retail instalment sales and contracts". So corrected, the finding would be consistent with the evidence submitted by Appellees (see affidavit of Milan V. Ayres, Secretary and Analyst of the National Association of Sales Finance Companies, McHenry Record pp. 81-83; G.M.A.C. Record pp. 78, 79), that the Act will not affect to any substantial degree the necessitous or the people whom the defendants characterize as having "little bargaining power" (affidavit of Edward E. Edwards, McHenry Record p. 81; G.M.A.C. Record p. 77). This is true because families having total annual incomes of less

than $1,000 are obliged to spend practically their entire income for the primary necessities—food, fuel, shelter and clothing—which, except for a negligible percentage of the sale of clothing, are not sold on the instalment plan. There being no evidence to the contrary in the Record, it is submitted that the finding in question should have been supplemented so as to incorporate the additional record-fact—of which, as a matter of fact, this Court, without such finding, might properly take judicial notice—*that the Act is not for the protection of the needy or the poor since the purchases which they make on the instalment plan constitute only a negligible part of total retail instalment sales.*

In their argument on this point Appellants invoke vaguely the unequal "bargaining power" of installment buyers (Appellants' Briefs pp. 24-25) as a circumstance upon which they attempt to vindicate the price-fixing provisions of the Act. If that phrase is intended to mean anything other than that retail instalment buyers are in the same class as necessitous borrowers, then its speciousness as the basis for controlling the maximum by which a merchant's time price may exceed his cash price is apparent from the fact that, given a *voluntary* buyer in the market to buy an item of merchandise, his power is as equal or as unequal, in a cash as in an instalment purchase. If the phrase has any significance in the constitutional aspects of this case, it is submitted that to be consistent Appellants would have to be prepared to support the validity of an Act fixing generally the *cash prices* as well as the time prices of all goods selling in a specified price-range.

It follows from the above that the Indiana Act cannot be vindicated as a reasonable exertion of governmental au-

thority for the promotion of the public welfare by the analogy which Appellants seek to create between the "factual basis of regulation" underlying this Act and the historical and factual justification for the so-called "Usury Statutes". *As was stated by this Court in the case of Hogg* v. *Ruffner* (*supra*), *a sale on instalments has "none of the characteristics of usury".* This case and the numerous decisions to the same effect (*supra*, pp. 18, 19) establish that instalment sales do not come within the usury laws. They stand for the proposition that a state cannot control an instalment sale on the ground that it is a loan. The same facts, the same reasons and the same considerations that underlie those decisions support the objection to the attempted regulation of such sales under this Act. The retail instalment sales which those decisions hold are not subject to or within the purview of the usury laws are the same retail instalment sales which this Act seeks to control, —on the same erroneous conception of the nature of such sales as was rejected in those cases.

B. *The alleged existence of "abuses" in the business of retail instalment selling or in the business of purchasing retail instalment contracts does not furnish justification for the fixing of all prices in retail instalment sales.*

Appellants say (Appellants' Briefs p. 10) that the purpose of the Act "* * * is to prevent extortionate and unreasonable prices for credit extended in retail instalment sales of goods * * * and to prevent certain practices, in their nature fraudulent, which have arisen out of the combination of the retail seller and the finance company in the modern business of sales financing".

"Extortionate Charges": The findings of fact are barren of any proof that "extortionate and unreasonable" finance charges prevail in Indiana. On the contrary the findings disclose effective competition,—the existence of which is inconsistent with extortionate "finance charges,"—not only in the business of retail sales of automobiles and other goods having standard prices but also in the business of purchasing retail instalment contracts (McHenry Finding 42; G.M.A.C. Finding 37). A material and important factor in this competition *is the amount of the time price,* and therefore the amount of the finance charge (McHenry Finding 42; G.M.A.C. Finding 37). Automobile instalment sales in Indiana constitute more than 60% of all retail instalment sales of automobiles (McHenry Finding 38; G.M.A.C. Finding 33); and other goods having standard prices such as oil-burners, refrigerators and other household appliances are also largely sold in instalments. The record shows (McHenry Finding 42; G.M.A.C. Finding 37) that the amount of the time price is a competitive factor the importance of which "* * * is emphasized by the interest * * *" which the automobile and other manufacturers have "* * * in maintaining, for competitive reasons, the retail instalment prices, as well as the cash prices of their products, as low as possible. (the word "instalment" in this finding was omitted in error in the printing of the Transcripts of Record.) In the light of these findings the averment made by Appellants (Appellants' Briefs p. 11) that the General Assembly "* * * might well have considered that extortionate charges for credit in retail installment sales * * * prevailed in Indiana * * *" cannot be supported.

The Indiana Legislature had before it the report of the Department of Financial Institutions, a considerable por-

tion of which was "devoted to finance companies and what the report characterized as their 'effective rates of interest for the extension of credit' " (Appellants' Briefs p. 5). This report was in evidence in the court below and the treatment of "rates" in the Report is summarized in the Findings of Fact (McHenry Finding 28; G.M.A.C. Finding 23),—together with other evidence relating to the question of "finance charges". Nowhere in the Finding is there a statement, or even a suggestion that the prevailing finance charges included in time prices in Indiana, or the prevailing "discounts" of finance companies, are either "unreasonable" or "extortionate". As the basis for alleging the existence of "extortionate charges" Appellants rely *solely* on examples of certain "variations" in finance charges. These "variations" are emphasized and italicized by Appellants in their briefs (p. 5) *but Appellants significantly omit to italicize (and, in their argument at pages 20 and 21 of their brief, to mention) the fact, separately paragraphed in this Finding, that the variable factor of insurance cost and the other variable factors mentioned "* * * account for part of the variation in amounts, the extent of which cannot be determined from the evidence".* Significant, too, we think is the failure of Appellants, in commenting upon this finding, even to mention the G.M.A.C. time-price differentials "which are generally made use of by retail sellers in arriving at the time prices at which they sell at retail new and used automobiles manufactured by General Motors Corporation or its divisions". We say "significant" because the figures showing the G.M.A.C. time-price differential *are the only figures in this Finding having any evidenciary value because they were determined after segregating the all-important factor of insurance cost;* because G.M.A.C. and other fac-

tory affiliated companies purchase together more than 60% of all of the instalment contracts arising out of retail automobile instalment sales in the State of Indiana (McHenry Finding 38; G.M.A.C. Finding 33); and because the finance charges of other retail sellers and the "discounts" of other finance companies, banks and small-loan companies—because of the admitted competitive situation (McHenry Finding 42; G.M.A.C. Finding 37)—must necessarily conform to those prevailing in the sales of General Motors products and in the purchase of instalment paper resulting from such sales.

There being no evidence, then, in either Record of the prevalence or even of the existence of "extortionate" or "unreasonable" finance-charges in retail instalment sales in Indiana, it follows that Appellants cannot place reliance on this contention in their attempted justification of the Act's validity.* With this element removed from Appellants' "factual basis for regulation", there remains of their thesis but one other ground on which they attempt to justify the validity of the price-fixing features of the statute—*i.e.*, the alleged existence of certain "fraudulent" practices in the business of retail sellers and in the business of finance companies.

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*The findings of fact in both the *McHenry* and *G.M.A.C.* cases not only prove the non-existence of exorbitant charges (*supra*); they also establish, by proof of the existence of free competition among retail sellers and among finance companies (*supra*), the absence of any "arbitrary control to which the public might be subjected without regulation" (*Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522 at p. 538). Consequently, the findings of fact effectively exclude both the business of McHenry Chevrolet Co. Inc. and the business of G.M.A.C. from the third of the three categories of businesses "affected with a public interest" defined by this Court in the *Wolff Packing Co.* case.

"Abuses":—Appellant's contention that "abuses" which are "* * * detrimental to the public welfare * * *" exist in the "* * * business of financing retail instalment sales * * *" (Appellants' Briefs p. 3) amounts to this*: (1) Retail seller in fixing the time price of an automobile does not insert as a separate item in the written contract signed by the buyer the dollar amounts of the various elements which enter into the make-up of that price (McHenry Finding 27; G.M.A.C. Finding 22); (2) the retail buyer *might* not know the dollar amount of these elements (although the Findings establish that he *may* know and that if he does not know he may upon inquiry ascertain them); (Appellants' Briefs p. 6; McHenry Findings 4 and 27; G.M.A.C. Finding 22); (3) If, after the time sale of the automobile has been completed, the retail seller should sell the instalment contract, he *may* eventually be paid more in money for that contract than he would have received if the sale of the car to the retail buyer had been for cash. The amounts which may be so paid to the retail seller, all of which of course go to increase the time price to the retail buyer, are variously

*In addition to the "abuses" mentioned above Appellants, in their attempt to show that the circumstances vindicate the Act as a reasonable and appropriate exercise of governmental authority, refer to two other "elements of the business of instalment selling" (Appellants' Briefs p. 25). The first of these "elements" relates to the Finding (McHenry Finding 35; G.M.A.C. Finding 30) that forms of contracts supplied to retail sellers by finance companies generally contain no provision for a return of any part of the finance charge or time price differential to the buyer in the event he wishes to prepay the contract. The second of these elements relates to the so-called "delinquency charge" (McHenry Finding 36; G.M.A.C. Finding 31; Sections 6, 7 and 26(c) of the Act). The "prepayment provisions" (Section 6 of the Act) are subject to attack on the same grounds as the provisions authorizing the fixing of a maximum finance charge and both this Section and Section 26(c) are attacked on the ground that they illegally delegate legislative power to the Department of Financial Institutions (*infra* pp. 48 and 49).

termed reserves, bonuses, participation, and rebates (McHenry Findings 25, 31, 32, 33 and 34; G.M.A.C. Findings 20, 26, 27, 28 and 29). There is no finding that the practice of making such payments is "detrimental" to retail buyers. On the other hand, the findings show that the "pack" is confined to the business of selling automobiles and the business of purchasing automobile instalment contracts; and that these practices represent only a matter of the dealer's selling policies (same Findings). (4) The retail buyer is not informed as to whether the dealer is to receive any such payments nor is he informed the dollar amount thereof.

Stating it in another way: the retail buyer *might* not know, although the information is available to him, the dollar amount of the finance charge and insurance cost included in the time price of the automobile he is buying; the retail buyer may be led to believe—through a misrepresentation by the retail seller—that when the latter sells the instalment contract he will receive less than what may eventually be paid him by the purchaser of the contract.

Appellants would have this Court believe that these "abuses" (together with the other "elements" of the business of instalment selling referred to in the footnote on p. 37 of this brief) are so "detrimental to the public welfare" as to justify regulation "in the promotion of the public welfare" (Appellants' Briefs p. 3). And Appellants would also have this Court believe that on such a "factual basis for regulation" a statute which fixes the prices at which *all* retail sellers may sell their goods in instalments and which, after the instalment sale is completed, fixes the prices at which the instalment contracts may be bought and sold, is a reasonable and appropriate exercise of governmental

authority to promote the public welfare.* It is submitted that the mere statement of this contention establishes its unsoundness.

The most that can be said in favor of Appellants' position on this point is that the retail buyer, by a proper legislative enactment—and we deny that this Act is such—may be entitled to a more complete itemization, in the written contract, of the terms of sale and of the elements that go into the dealer's mark-up on a retail sale in instalments. Certainly the Act goes too far and is an unreasonable exercise of governmental authority when, in order to accomplish such a purpose,—which for the sake of the argument we will assume to be a proper one—the Legislature proceeds to fix the amount the retail seller may receive for his goods—and, even further, then proceeds to limit arbitrarily the amount for which the dealer may sell the contract (*infra* pp. 47-48).

This Court has held that even where there is proof that "* * * extortion, fraud, imposition, discrimination and the like * * *" are practiced in a business—whether to a large or to a lesser extent, or where there is proof that the business is one which peculiarly lends itself to such practices, the State Legislature is not justified in fixing prices in that business. The existence of such abuses *may* be grounds for regulation "* * * but not for price fixing * * *" (*Ribnik* v. *McBride*, 277 U. S. 350 at p. 358).

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*It is significant that both the Wisconsin and Massachusetts Commissions (whose Reports are referred to at pp. 32 and 33 of Appellants' Briefs) were opposed to any form of statutory fixing of finance charges; that the Wisconsin Legislature adopted the Commission's recommendations on this point (Section 218.01 of the Statutes, Chapter 474, Laws of 1935), and that the Massachusetts Legislature, after hearings during the 1935 Session on Senate Bills 4 and 55 and House Bill 805, failed to enact *any* legislation either in the field of instalment sales or in the field of instalment sales financing.

The strength of this Court's decision in the case of *Ribnick* v. *McBride* (*supra*) as a controlling authority we do not believe to have been weakened by its decision in the case of *Nebbia* v. *New York* (*supra*). In that case, as pointed out above, this Court laid down the principle, first, that the legislative policy or purpose must *reasonably* be deemed to promote the public welfare, and the legislative purpose must be a *proper* one, and second, that the laws passed to accomplish it *must have a reasonable relation to such purpose*. In applying the first phase of this principle this Court held that the purpose of the statute and the policy which it envisaged were proper ones, reasonably deemed to promote the public welfare, because milk is an essential element of human diet and the production and distribution of milk, a paramount industry of the State, "* * * *largely affects the health and prosperity of its people*" (291 U. S. 502, at p. 517). The State of New York was therefore held to be exercising, as "* * * a temporary expedient to redress an injurious economic condition, * * *" an "acknowledged police power" within a proper field—to wit, the sphere of public health and the general welfare.

Borden's Farm Products Co. v. *Ten Eyk,* Vol. 80 L. Ed. 469 at p. 472.

As to the second phase of the principle laid down by this Court in the *Nebbia* case: The milk industry in the State of New York had long been the subject of drastic regulation by the State; *despite such regulation* the industry was near collapse, "and the normal law of supply and demand was insufficient to correct maladjustments detrimental to the community" (291 U. S. 502 at p. 530). We respectfully submit that the important facts are these: Despite long standing and drastic State regulation of the milk

industry in New York—*which, up to the date of the enactment of the statute under consideration in the Nebbia case the legislature had evidently believed it unnecessary to extend to the point of price fixing*—the industry was on the verge of destruction and "the normal law of supply and demand was insufficient" to save the industry and to safeguard the public health. *Under such circumstances, all other means having failed, legislation authorizing the fixing of minimum prices was justified as bearing a reasonable relation to a proper legislative purpose.*

In other cases which have been before this Court, notably the case of *Tyson* v. *Banton,* 273 U. S. 418, and the case of *Fairmont Creamery Co.* v. *Minn.* 274 U. S. 1, the same principle, although differently phrased, as that enunciated in the *Nebbia* case, was laid down by this Court, *i.e.,* that price fixing statutes do not bear a reasonable relation to the legislative purpose, when that purpose is merely to correct "abuses" or "unfair practices" in an industry. A price fixing statute, which by its very character must be all-embracing, cannot be appropriate legislation to accomplish the correction of "abuses", since it must necessarily ignore the distinction between guilt and innocence and "since it applies wholly irrespective of the existence of fraud, collusion or extortion * * *" and, furthermore, "* * * since it of necessity fixes prices as well where evils are absent as where they are present" (*Tyson* v. *Banton,* 273 U. S. 418, at p. 443; and *Fairmount Creamery Co.* v. *Minn.,* 274 U. S. 1 at p. 10).

Since the only purpose of its enactment which on the Records-Facts might be termed a "proper purpose" is to disclose in the written contract of sale certain elements of the time price, the Indiana statute, fixing as it does the

prices of all goods sold in instalment sales, cannot be deemed to have a reasonable relation to a proper legislative purpose, and on this ground alone, must be declared invalid.

* * * * * * * * *

The purpose of the Act as stated by Appellants (Appellants' Briefs p. 10) is "to prevent extortionate and unreasonable prices for credit extended in retail instalment sales of goods * * *". The Appellants say, further, that the provisions authorizing the fixing of the maximum finance charges (as well as maximum delinquency charges and discounts on prepayment) "are of its very essence" (Appellants' Briefs p. 33). The plan of the Act according to Appellants was to provide "for the fixing of maximum finance charges * * * upon such a basis as would protect the retail instalment buyer from unreasonable prices for credit * * *" (Appellants' Briefs p. 43).

The method employed by the statute to achieve this purpose is *first,* to require segregation of the cash price from the balance of the time price and also of the insurance cost and the "finance charge"; *second,* to regulate the amount of the "finance charge", and *third,* in order to make effective the regulation of the "finance charge", to regulate the relations between retail sellers and finance companies and the prices at which retail instalment contracts may be bought and sold (Appellants' Briefs p. 16).

As stated at the beginning of this brief (*supra* pp. 4, 5), it was Appellees' contention in the lower court and it is their contention on this appeal that the "cash price" defined in the Act was intended to be the same "cash price" or "cash sale price" as is defined in the Findings of Fact. Appellants, however, (*supra* p. 5) have advanced the

theory that on a proper construction of the Act *the term "cash price" means the "time price."* If this construction of the Act is adopted, the power to fix the maximum finance charge becomes a futile thing—since it could become operative—if at all—only *after* the finance charge has been determined and made a part of the time price. Viewing the application of this theory of construction in the light of the primary purpose of the Act, *i.e.,* the regulation of the finance charge, one is reminded of the Æsopian proverb: "It is not time to shut the stable when the horses be lost and gone." (William Caxton, *Æsop,* ii, 245.)

If such is the construction to be given to the Act, its primary purpose, to wit, the regulation of what Appellants are pleased to term "the cost of credit" becomes impossible of achievement; and, if Appellants are correct in their contention, the Act must be declared invalid, upon the principle laid down by this Court in the *Nebbia* case, as constituting legislation having no reasonable relation, and which is not adapted, to its avowed purpose.

Even on the construction which we have given to the Act (*supra* pp. 4, 5), the Act fails to accomplish the purpose ascribed to it by Appellants because its application is limited exclusively to those instalment sales in which the cash price of the goods which are the subject matter of the sale has been "agreed upon in good faith" by the parties (Section 1 of the Act). It is the practice of some merchants in certain goods and commodities such as furniture and jewelry to quote or mark their goods with only a time price (McHenry Finding 9) and the Act has no application to instalment sales of such retail sellers. It follows that the Act will affect principally, if not solely, those retail sellers who handle standard priced goods such

as automobiles and refrigerators, the cash prices of which are publicized by the manufacturers and are well known, leaving unaffected retail instalment sales of goods which have no standard or known cash price. It is apparent, then, that the Act will not effect disclosure of the terms of the time-sale transaction or of the time-price, much less regulation of the time-price (or "prepayment discount"), in those instalment sales which peculiarly lend themselves to "concealment" of the "cost of credit" and the imposition of "exorbitant charges", and in which, on Appellants' thesis, regulation is most needed. It therefore fails utterly to accomplish the primary purpose for which it was enacted.

A legislative enactment which would require *all* sellers to disclose in a written contract the price at which they would sell the goods for cash, if the sale were to be a sale for cash instead of one on the instalment plan, would at least avoid the discriminatory effect inherent in the Act under consideration. Certainly if a state can validly fix the maximum by which the time price may exceed the cash price of goods having a standard or at least readily ascertainable cash price, the State would have the power to enact legislation requiring *every* seller making a time sale to state the price at which he would be willing to sell the specific goods in a sale for cash; and it is difficult to see how any greater "administrative difficulties" (Appellants' Briefs, pp. 28-29) would be created in the operation of such a statute than in the operation of the statute under consideration.

The vice in the definition of retail instalment sales is a two-fold vice which, permeating the Act, vitiates its validity in entirety. *First*:—The sweeping breadth of the Act

which by virtue of this definition affects retail instalment sales of all classes of goods, the cash price of which is not in excess of $1,500., results in an unreasonable failure to discriminate as between goods which are luxuries and "conveniences" and goods which Appellants (their Briefs p. 32) would consider "economic necessities". (In this connection it should be noted, as we have pointed out before, that the "primary necessities" are not sold in instalment sales). *Second*:—The Act, as stated above, works a discrimination, which is equally unreasonable, as between sales of goods whose cash prices are well known or at least readily ascertainable and sales of goods not having a standard or well-known cash price.

Because of this two-fold vice no single section of the Act may be given separate validity—even if this Court should fail to agree with Appellants' contentions as to the severability of the Act's provisions which are contained in Point IV of this brief.

POINT III

Sections 9, 10 and 15(d) and Sections 6 and 26(c) of the Act are unconstitutional and void in that they deprive McHenry Chevrolet Company, Inc. of its property without due process of law; and Sections 9, 10 and 15(d) and Section 13 are unconstitutional and void in that they deprive G.M.A.C. of its property without due process of law.

SECTIONS 9, 10 AND 15(d) OF THE ACT: Their briefs indicate quite clearly Appellants' view that these Sections —and also Section 13, the licensing section (*infra* p. 49),—

were enacted solely for the purpose "* * * of carrying out the finance charge provisions of the Act, * * *" to which they " * * * are absolutely essential * * *" (Appellants' Briefs p. 14, see also p. 16). We agree with this view as will be seen later under Point IV (*infra,* p. 52), in which we point out that all of these Sections must fail because of the invalidity of the provisions of the Act authorizing the fixing of maximum finance charges. It is our contention, further, that whether standing alone or merely as an aid to the enforcement of those provisions of the Act which fix the time price of goods, the three Sections referred to in the caption of this paragraph are invalid—Sections 10 and 15(d) both as to the Retail Seller and as to G.M.A.C. because their enforcement would result in fixing the prices at which retail instalment contracts might be sold by the Retail Seller and purchased by G.M.A.C.; and Section 9 as to the Retail Seller, in that it unlawfully interferes with the right of Retail Seller to dispose of his retail instalment contracts to whomsoever he pleases. This Section by its terms would subject the merchant who sells his contracts *outside the state* to the penalties provided for in the Act,—which on its face can have no constitutional justification,—even were it assumed that the state has the power to limit the freedom of contract of a retail seller by limiting his sales within the state to one designated class of purchasers. See *Allgeyer* v. *Louisiana,* 165 U. S. 578.

The transaction whereby Retail Seller sells and assigns an instalment sale contract is an ordinary transaction of sale and purchase. That intangible property may be bought and sold as may tangible property and that such purchases and sales do not fall within the scope or concept

of usury statutes has been established by this Court and by the Supreme Court of Indiana.*

It follows from this that the invalidity of Sections 10 and 15(d) may be urged on the same grounds as are urged above (Points I and II) in attacking the provisions of the Act fixing the maximum finance charge in the original contract of sale between the Retail Seller and his buyer.

Appellants argue that Section 15(d) does not forbid the purchasing by licensees of retail instalment contracts at a less price than the unpaid balance and, in support of this argument, say that such a purchase would only be a ground for the revocation of the finance company's license if " * * * the licensee has wilfully avoided or attempted to avoid *the provisions of the Act* by so doing * * * " (italics ours) (Appellants' Briefs p. 42). Section 15(d) actually provides that the license may be revoked if the Department finds " * * * that the licensee has wilfully avoided or attempted to avoid the *operation or effect of this Act* by purchasing any retail instalment sale contract or contracts at a less price than the unpaid balance thereon * * * ". However, if this provision has any significance at all, it is apparent that its meaning is so vague and indefinite as to render it nugatory.

As to Section 10: In fixing the amount, included in the time price of goods as the finance charge and reflected in the unpaid balance of a retail instalment contract which the purchaser of such a contract is to be permitted to pay

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*_Nichols_ v. _Fearson_, 7 Peters 103; _Billingsley_ v. _State Bank_, 3 Indiana 375. On this point see also _General Motors Acceptance Corporation_ v. _Mid-West Chevrolet Co._, 66 F. (2d) 1 and 74 F. (2d) 386, and _Meserole Securities Co._ v. _Cosman_, 253 N. Y. 130, 170 N. E. 519.

to the seller of the contract, the Department is *expressly directed* to disregard the fact that such contract may have been sold without recourse or with recourse (or under an agreement by which the retail seller agrees to repurchase the specific goods in the event of their repossession on the buyer's default). In other words, the Department is commanded to make no differentiation as between the price to be paid for contracts sold with a "warranty of soundness" and sales which may be made entirely "without recourse". That the standard which this Section sets up is an arbitrary and unreasonable one is obvious, and for this reason alone, it is submitted, Section 10 is invalid, both as to the Retail Seller and as to G.M.A.C.

SECTION 6 OF THE ACT: This section, which relates to "prepayments", has already been mentioned (*supra*, p. 37, footnote). This section, in the sentences immediately following the provision that the finance charge may not exceed the maximum authorized by the Department of Financial Institutions, provides *that every retail buyer shall have the right at any time to pay the purchase price "* * * whether then due or not * * *" and upon such payment to receive a reduction in the unpaid purchase price, the amount of which is to be fixed by the Department.* By these provisions the Retail Seller is deprived of the right to fix on his own terms the time-selling price of his goods.

The power delegated to the Department by Section 6 to fix the amount of the unpaid purchase price to which Retail Seller is to be entitled upon "prepayment" is analogous to the power granted to the Department to fix the total amount of the original time price (*supra*, Points I and II); the validity of the provision in question is accordingly

subject to attack on the same grounds as those set forth under these Points and on the additional grounds (1) that being appendant to the invalid portions of the Act which fix the finance charge, these provisions of Section 6 fall with them (*infra*, p. 52), and (2) that since no standard whatsoever is provided in the Act by which the amount of the prepayment "discount" is to be fixed by the Department, these provisions involve an illegal delegation of the legislative power of the State and therefore involve a denial of due process of law.*

Section 26(c)—Since no standard whatsoever is provided in the Act by which the amount of the "delinquency charge" is to be fixed by the Department, this section similarly involves an illegal delegation of the legislative authority of the State and therefore involves a denial of due process of law.

SECTION 13 OF THE ACT: The qualification which this Section sets up for the granting of a license is one that has already been condemned by this Court. The Section provides that a license to purchase instalment sale contracts may be granted only *"if the Department shall find that the applicant can operate its business economically and efficiently"*. Since the economic and efficient operation of any business is directly dependent upon competitive conditions, the only reasonable construction to be given this standard is that the Department is expressly required to take into consideration the number of finance companies already in

*Article 3, Section 1 of the Constitution of Indiana (Appendix *infra* p. 58); *Zoercher* v. *Agler*, 202 Ind. 214, 172 N. E. 186; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter* v. *United States*, 295 U. S. 495.

the field and the effect which the competition of such companies would have upon the management and operation of the applicant. The validity of this construction is borne out by the sentence of the Act following the words quoted above, which reads: "In considering economic and efficient operation, the Department shall take into consideration the fact that this Act is designed to promote competition between licensees for the benefit of the class of retail buyers within its scope." It is submitted that this qualification amounts to a requirement of economic justification and that it is therefore the same qualification as was condemned by this Court in the case of *New State Ice Co.* v. *Liebmann,* 285 U. S. 262. In that case the statute provided that the license could only be issued upon proof showing the necessity for the manufacture of ice in the designated community. The licensing board was authorized to "take into consideration the responsibility, reliability, qualifications and capacity" of the applicant and of the persons already licensed in the community so as "to afford all reasonable facilities, conveniences and services to the public". In holding these requirements to be beyond the power of the State to impose, this Court said (at p. 278):

> "Plainly, a regulation which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private business, such as that under review, cannot be upheld consistent with the 14th Amendment.
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> * * * * * * * *
>
> "The control here asserted does not protect against monopoly, but tends to foster it. The aim is not to encourage competition, but to prevent it; not to regulate the business, but to preclude persons from engaging in it."

The qualification set up by Section 13, furthermore, is so indefinite as to be incapable of definite application. Before a license is issued the Department is required to find "* * * that the applicant can operate its business *economically and efficiently,* * * *". The Act is silent as to how such "operation" is to be gauged; as to what the criterion of "efficient operation" is to be; as to the extent which the Department must take into consideration the fact that the Act "is designed to promote competition * * *". It is submitted that the standard laid down by this Section, or rather the lack of a standard, grants to the Department a range of action that could not be exceeded by the General Assembly itself. This Section therefor is invalid as an illegal delegation of the legislative power.

The Section is invalid on another ground, namely, that it bears no reasonable relation to the purpose of the Act which, as we have seen above, on Appellants' submission is "the prevention of unreasonable prices for credit" and the elimination of certain "fraudulent" practices. The granting of licenses to those companies only which satisfy the Department that they can operate their business "economically and efficiently" bears no reasonable relation to such a purpose. It is obvious that a corporation may operate economically and efficiently and at the same time exact unreasonable charges and indulge in all of the "fraudulent" practices which, on Appellants' contention, the Act is aimed to prohibit. Conversely, an inefficient company might render services in a manner that would meet with the entire approval of the Department. The economic and efficient operation of a company is a matter which relates solely to the internal management of the business; it has no relation to, nor is it a criterion of, the relation of such business to the public.

POINT IV

If the provisions of the Act authorizing the fixing of maximum finance charges are invalid, all related provisions including those which regulate the sale and purchase of retail instalment contracts, being appendant to such provisions, must fall with them and therefore be declared invalid.

It is abundantly clear, from the Report of the Department of Financial Institutions, from the provisions of the Act itself, and from the Appellants' Briefs (at pages 10, 16, 33 and 34) that the central purpose and "essence" of the Act is the regulation of "finance charges" in instalment sales of merchandise (within the $1,500 class). In form, the provisions of the Act fall into two divisions, the first relating to the instalment sale transaction between the retail seller and the retail buyer and to the finance charge which is an integral part of the instalment sale price, and the other relating to the sale of such contracts by retail sellers and their purchase by finance companies (*supra* p. 2). The correctness of this analysis is conceded by Appellants who, after stating that the business regulated "is that of extending credit to retail buyers in instalment sales of merchandise", then proceed to explain the structure of the Act as follows (Appellants' Briefs p. 16):

> "In order to effect the regulation the Act prescribes the form of contract which must be used by the retail buyer and seller; authorizes the fixing of maximum finance charges, maximum delinquency

charges and minimum discounts; requires the parties to exhibit the agreed price of the merchandise in the contract; provides for the licensing and regulation of finance companies and restricts the right of the retail seller to sell and the right of the finance company to buy retail installment contracts *in order that the maximum charges and minimum discount may be made effective*". (Italics ours.)

To the same effect—at page 34 of their briefs,—Appellants say: *"The restriction of sales of such contracts to licensees * * * is obviously necessary to carry out the general purpose of the Act to limit finance charges * * *"* (italics ours). And, similarly, referring to the provisions of Section 9 (*supra* p. 45) and Section 11, which is the licensing provision, Appellants state (Appellants' Briefs p. 39): "There would clearly be no efficacy in providing for the licensing of finance companies if retail sellers could, with impunity, sell to an unlicensed company; *and without the licensing provision of Section 11, enforcement would be impossible*". (Italics ours.)

Only one conclusion may be drawn from these statements: The provisions of the Act requiring retail sellers to sell their contracts only to licensees, the licensing and regulation of the business of finance companies, and the regulation of the amount of the discount involved in the business of finance companies *would be without object unless the amount of the finance charge can be fixed.* The second phase of regulation included in the two divisions referred to above is supplementary to the first, and since the provisions in the second group would be useless by themselves if the fundamental power to control the finance charge could not be validly exercised, it is unreasonable to

suppose that the General Assembly would have enacted them. It follows therefore that if the right of the Department to fix maximum finance charges is denied, the provisions which require licensing and regulation of licensees, the limitation requiring retail sellers to sell their contracts only to licensees, and the fixing of the purchase price of the instalment contracts must also fall.

The case of *Williams* v. *Standard Oil Co.*, 278 U. S. 235, is apposite. In that case, a State statute attempted to fix the price of gasoline and authorized the Division of Motors and Motor Fuels to make investigations and issue permits. The price fixing provisions of course were held unconstitutional and this Court also held that the remaining provisions of the Act, including certain provisions in respect of rebating and discriminating, must fall. This Court said (at page 243):

> "The function of the division created by Section 1 is to carry those provisions into effect, and if they be stricken down as invalid the existence of the division becomes without object. The purpose of collecting the data set forth in Section 2 is to furnish information to aid in the fixing of proper prices. The requirements in Section 3 that a permit must be obtained before any person can engage in the business of selling gasoline and those in Section 4 that the application therefor must state the character of the business, the number and location of the places where business is to be carried on, the price or prices at which the applicant is then selling gasoline, the cost price thereof, and the price at which he proposes to sell, obviously constitute data for intelligently putting into effect the price-fixing provisions of the law or means to that end. The taxes imposed by Section 10 are solely for the purpose

> of defraying the expenses of the division of motors and motor fuels, and since the functions of that division practically come to an end with the failure of the price-fixing features of the law, it is unreasonable to suppose that the legislature would be willing to authorize the collection of a fund for a use which no longer exists."

It would appear from their "Statement of Points to be Relied Upon" (McHenry Record pp. 84-86; G.M.A.C. Record pp. 80-82) that Appellants seek only the survival of the following Sections of the Act, in the event of the " * * * failure * * * of the Sections designed to regulate the cost of credit * * * ": Sections 1-5 inclusive, Sections 21-24 inclusive, Section 28, a part of Section 29, and Sections 30-35 inclusive.

Appellees' position as to the separate validity of Sections 1-5 inclusive has already been stated (*supra* pp. 39, 41). As to Sections 21-24 inclusive: These Sections, which relate to contracts to prevent competition, are so inseparably linked with the general purpose and provisions of the other Sections of the Act as to make it apparent that the General Assembly would not have enacted them as a separate law. The Sections are not general in their application; they do not prohibit monopolistic contracts in the field of instalment selling generally but only those particular contracts which are covered by the Act, that is, contracts involving sales in which the cash price is not in excess of $1,500, may be paid in instalments, and in which the seller has retained a security interest in the goods. By thus restricting the operation of these Sections, the General Assembly has indicated its intent to consider these Sections as an integral part of the general scheme relating to the control

of such sales. Furthermore, these Sections deal only with contracts and "threats" in consequence of which retail sellers may be compelled to sell their instalment contracts to a designated *"licensee"*, to "threats" made by any *"licensee"*, and to payments made to or received by *"licensees"*. It is obvious that these particular Sections become meaningless if, as Appellees contend, the licensing provisions of the Act are invalid, since in such event no *"licensees"* would exist who might become beneficiaries of monopolistic contracts or the makers of the prohibited "threats", or the recipients of the payments referred to in these Sections.

Even conceding the severability of these Sections, they must be declared invalid for the reasons stated above on pages 44-45 of this brief: the vice in the definition of retail instalment sales,—which is the keystone upon which the arch of this entire statute has been built,—would as to these Sections again create an arbitrary and discriminatory result,—for only those manufacturers (and *their* affiliated or controlled finance companies) would be subject to the prohibitions of the Act whose products have standard prices or prices which the manufacturers have publicized to the buying public. All other manufacturers and all of *their* affiliated or controlled finance companies, irrespective of their activities in violation of these Sections, would go harmless.

If, as Appellees contend, the above enumerated Sections may not survive, the remaining Sections enumerated by Appellants, to wit, Sections 28 and 29 and Sections 30-35 would have no efficacy. It follows therefore that there was no error in the decree of the District Court in enjoining the enforcement of the Act *as an entirety.*

Conclusion

Appellants and Appellees have stipulated (McHenry Record, pp. 79-83; G.M.A.C. Record, pp. 76-80) that the special findings of fact made by the trial court constitute all of the evidence and facts necessary to the consideration of the questions presented by Appellants' Assignments of Errors in these causes, and that, with the exception of one (referred to on pp. 30, 31 *supra*), these findings may be treated as supported by the evidence. Appellees submit that the circumstances shown by these findings do not vindicate the Act as a reasonable exertion of governmental authority in the promotion of the public welfare, for the reasons set forth above; that the threatened enforcement of the Act as against each of the Appellees will deprive them respectively of their property without due process of law; and that the decrees of the District Court in both causes, declaring the Act unconstitutional and void in its entirety and enjoining its enforcement as against each of the Appellees herein, therefore should be affirmed.

Respectfully submitted,

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Appendix

Article 3, Section 1, of the Constitution of Indiana:

> "The powers of the Government are divided into three separate departments: The Legislative, the Administrative and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."